Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 1.17 of the	)	GC Docket No. 02-37
Commission's Rules Concerning	)	
Truthful Statements to the Commission	)	

TO THE COMMISSION

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

The Minority Media and Telecommunications Council ("MMTC") respectfully submits its Comments in response to Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission (NPRM), FCC 02-54 (released February 22, 2002) ("NPRM").[1/]

Those portions of the proposed rule amendments that deal with regulatees are noncontroversial and desirable, in light of the importance of truthfulness from those seeking the privileged use of public property from the government.[2/] MMTC objects only to the proposal that calls for the Commission to extend its regulatory power to members of the public who come

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1/ The views expressed in these Comments are the institutional views of MMTC, and do not necessarily reflect the individual views of each of its officers, directors or members.

2/ Sea Island Broadcasting Corporation of S.C. v. FCC, 627 F.2d 240, 241 (D.C. Cir. 1981). The Commission expects a "high standard of punctilio" of broadcasters or those seeking broadcast licenses. See Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965).

before the Commission with information that could assist the agency in the performance of its duties. These individuals do not wish to assume the "special status of licensees as trustees of a scarce public resource";[3/] Instead, they are merely volunteering to help the Commission do its job and they seek nothing in return.

We are not referring to witnesses who swear an oath in a hearing, or to petitioners to deny who must attest under penalty of perjury to the statements in their petitions. Like regulatees, they agree to be held to a higher standard of accuracy under Rule 1.16, which applies to everyone who files an application and to every party appearing formally in an adjudication.

Instead, we refer to the thousands of people who write letters or file complaints about programs (often innocently lacking an accurate tape or transcript), or who state that they are victims of employment discrimination (knowing that the Commission cannot award them damages), or who state as whistleblowers that they know of discriminatory practices by regulatees. They are working people, parents concerned about their children, physicians, teachers, civil rights advocates, and public officials including Members of Congress. We refer to them as "non-witness non-regulatees."

3/ See Leflore Broadcasting Co., Inc., v. FCC, 636 F.2d 454, 461 (D.C. Cir. 1980).

Unlike commercial licensees, these individuals are not motivated by profit. Instead, they are trying to help the Commission do what it cannot do given its limited resources: be aware of violations of law by its regulatees. When they bring civil rights matters to the Commission, they are often acting at great risk to their careers.[4/] To regulate effectively, the Commission should not inadvertently chill the flow of information from these citizens, complainants and whistleblowers.

Most of these citizens do not have counsel and are unfamiliar with the Commission and its processes; thus, through negligence, they may make assertions that prove not to be true. For example, suppose a whistleblower, who works at a television station, telephones the Enforcement Bureau and states that she knows of six senior managers at the station who have conspired to be sure that minorities or women, because of their race and gender, will deliberately be excluded from positions on a new local talk show. If true, these allegations would disqualify the licensee.[5/]

4/ According to the Government Accountability Project, Ninety percent of all whistleblowers suffer some sort of reprisal. Caroline E. Mayer and Amy Joyce, "Blowing the Whistle," Washington Post, February l0, 2002, p. Hl, H4.

5/ See Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 62l, 629-30 (D.C. Cir. l978).

Consequently, the matter would be quite serious and the Commission would have to hold a hearing under Section 309(e) of the Act. At the hearing, the whistleblower testifies that she made the original telephone call to the Enforcement Bureau. On her own motion, she adds that she has since learned that two of the six managers were not involved in the misconduct, and she apologizes for her negligence regarding the two innocent managers. After observing her demeanor, the ALJ credits her testimony, while also finding that in her original phone call she violated new Rule 1.17.

The station loses its license because of the misconduct of the four remaining managers. Other broadcasters seeing what happened, become more careful and take steps to prevent discrimination.

However, this would be the last such case. The licensee or the two innocent managers would carry the ALJ's Section 1.17 finding into state court as the basis for a "SLAPP" (strategic lawsuit against public participation) suit against the whistleblower. The state court would be compelled to afford the Section 1.17 ruling full faith and credit. Although such an outcome could financially ruin the whistleblower, that is not the plaintiffs' real objective: they want to embarrass and silence the whistleblower, making her an example for anyone else who might think of going to the

FCC with allegations of discrimination. In our experience in the civil rights world, that is exactly what would happen if the Commission erroneously extends Rule 1.17 to non-witness non-regulatees.

The Commission already has remedies available to it in the event a non-regulatee abuses its processes.[6/] These instances of abuse are rare. As the nonexistent "O'Hair" Petition demonstrates, thousands of well meaning people write to the Commission every year and negligently make statements that are objectively false. But they are not process-abusers.

A citizen who contacts a government official to lodge a complaint is exercising her right to petition for redress of grievances.[7/] Embedded in this provision is the right to complain to public officials and to seek judicial relief.[8/]

6/ The only instance that comes to mind arose a generation ago. The "Martin-Trigona" litigation involved an apparently disturbed individual who eventually was enjoined by the state courts in Connecticut from further vexatious litigation.

7/ U.S. Const., Amend. 1 ("Congress shall make no law... abridging...the right of the people...to petition the Government for a redress of grievances.")

8/ See, e.g., Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988); McCoy v. Goldin, 598 F.Supp. 310, 314 (S.D. N.Y. 1984) (stating that the right "to petition for a redress of grievances [is] among the most precious of liberties safeguarded by the Bill of Rights" and is "intimately connected...with the other First Amendment rights of free speech and free press").

This activity is entitled to the highest degree of protection. Extending Rule 1.17 to this activity would have to be justified under strict scrutiny. The NPRM does not attempt to identify a compelling governmental interest that would justify the rule, nor does the NPRM cite any instances in which negligent misstatements by members of the public have prevented the government from pursuing any compelling governmental interest. Thus, there is no basis for holding that the means chosen -- giving regulatees the ammunition with which to ruin complainants -- is narrowly tailored. The proposed extension of Rule 1.17 to non-witness non-regulatees would chill public participation and thus would hamper the agency's ability to perform its functions effectively.[9/] Moreover, it is of doubtful constitutionality.

9/ See, e.g. Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331, 332 (D.C. Cir. 1972) (holding that a "unified community" can sometimes "effectively supplement the constitutional and statutory authority of the FCC," a development the Court has "consistently welcomed as serving the public interest"); see also Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 FCC Rcd 2329, 2379 ¶123 (2000), recon. denied, 15 FCC Rcd 22548 (2000), reversed on other grounds sub nom. MD/DC/DE Broadcasters Association v. FCC, 236 F.3d 13, rehearing and rehearing en banc denied, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. MMTC v. FCC, _____ U.S. _____, 122 S.Ct. 920 (2002) ("[g]iven the Commission's limited resources, we believe that it is important that the community have a role in monitoring broadcaster compliance with our EEO Rule.")

The Commission should adopt the remaining proposals in the NPRM but not the extension of Rule 1.17 to non-witness non-regulatees.

Respectfully submitted,

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